IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA.

RSA No. **155 of 1996**

Reserved on : 25.10.2007

Date of Decision : October 29, 2007

Surjit Singh & another …….. Appellants- plaintiffs

Versus:

Bimla Devi and others ….. Respondents- defendants

***Coram*:**

The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1] Yes.

For the appellants-plaintiffs: Mr. Rajnish Maniktala, Advocate.

For the respondents-defendants: Mr. R. K. Sharma, Advocate.

Sanjay Karol, J.

The present appeal arises out of the judgment and decree dated 1.11.1995 passed by the District Judge, Kangra at Dharamshala, in Civil Appeal No. 89-D/XIII-1995 titled as Kesar Singh v. Surjeet Singh & another allowing the defendants appeal and reversing the judgment and decree dated 20.8.1994 passed by the Sub Judge Ist Class (I), Dharamshala, Distt. Kangra, (H.P.) in Civil Suit No. 280 of 1986 titled as Surjeet Singh and another vs. Kesar Singh,.

The suit was filed by the original plaintiff Smt. Giano Devi on 17.5.1986 before the Sub Judge Ist Class(I), Dharamshala, District

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

Kangra and was registered as Civil Suit No. 280 of 1986 titled as Giano Devi v. Kesar Singh and Shri Vakil Singh. During its pendency, Smt Giano Devi died and, therefore, by virtue of the will dated 5.8.1983 (Ext.P-1), the sons of Vakil Singh were substituted as plaintiffs and Vakil Singh (defendant No.2) was deleted from the array of parties. Therefore, the parties to the suit, on the date of its decision was as under:-

"Surjeet Singh and Harjeet Singh sons of Vakil Singh
…….. plaintiffs

v.

Kesar Singh son of Gorkhu ……. defendant."

For the purpose of convenience, the present appellants herein are referred to as 'the plaintiffs', the original plaintiff is referred to as 'Smt. Giano Devi'. Original defendant No.1 Kesar Singh is referred to as Kesar Singh, original defendant No.2 Vakil Singh as Vakil Singh and since Kesar Singh has also died, his legal heirs, the present respondents are referred to as respondents.

The present appeal was admitted on the following substantial questions of laws:-

"1. Whether the gift deeds dated February 22, 1986 are the outcome of fraud, coercion, misrepresentation and undue influence built by the defendant/respondent?

2. Whether there existed a fuditiary relationship between the contracting parties to the gift deed?

3. Whether the burden of proof shifted on the defendant/respondent for proving the due execution of the gift deeds in question?

4. Whether the gifts were bad and void because of non-delivery of possession?

5. Whether the misappreciation of the evidence on record has resulted in the impugned judgment?

6. Whether in the given facts and circumstances of the case, the impugned judgment and decree in appeal is not sustainable in the eyes of law?"

Smt. Giano Devi filed a suit against Kesar Singh and Vakil Singh, defendants seeking a declaration that two gift deeds dated 22.2.1986 allegedly executed by her is a result of fraud, coercion, mis-representation and undue influence played by Kesar Singh and without knowledge, consent and free will and are illegal, inoperative, ineffective, null and void.

It was so pleaded that the Smt. Giano Devi (original plaintiff) aged 70 years, issueless, widow was owner in possession of different parcels of land measuring 0-13-56 hects, 10-18-17 hects and 0-74-32 hects. situate at different places in Mohal Jhikla Dohb, and Mauza Dohb, Tehsil and District Kangra, H.P. She was the only child of her parents and her father predeceased her mother. Her mother had adopted and treated Shri Vakil Singh (defendant No.2) as her son ever since he was 16 years of age. For over 19 to 20 years he was looking after them and also taking care of their properties. In fact her mother, out of love, affection and services rendered by him had gifted her land measuring 38 kanals in his favour. On 26.3.1985 her last rites were also performed by him. Plaintiff was the sole heir of the left out estate of her mother and she was also looked after by him. Since the life time of her mother, plaintiff had two houses one at village Charri and another at village Dohb where she stayed routinely and Shri Vakil Singh had been looking after her and providing all necessities of life including medical treatment.

While defendant No.2 Vakil Singh was away for few days, defendant No.1 Shri Kesar Singh hatched a conspiracy to grab her land

and through his women folk allured and influenced her to leave her house and stay with him on the pretext that she would be taken to a "Chela" (sorcerer/faith healer) at Kangra to get her treated for her long ailment. Considering her health and he being a collateral of her father she believed him. She was taken to Kangra alone where she was made to sign certain papers on the pretext that they pertain to her pension and if she did not sign the same her pension would be discontinued. Without understanding and knowing the contents thereof she signed the same. She was kept by Shri Kesar Singh till the time mutation was effected in his name before the Tehsildar, Kangra at Shahpur on 24.2.1986. It was only when he started openly proclaiming about the execution of the two gift deeds she learnt about the same.

Kesar Singh, defendant No.1 resisted the suit, inter alia, on the ground that Smt. Giano Devi ceased to be the owner of the property w.e.f. 22.4.1986 and the suit was not maintainable. On merits, it was pleaded that defendant No.1 Kesar Singh had been rendering services and sending money by Money Orders to Smt. Giano Devi and being the nearest heir was entitled to the property. Both Smt. Giano Devi and her father had wanted the property to remain in the family, therefore, the gift was executed and there was no undue influence, coercion, fraud etc. Adoption of Shri Vakil Singh defendant No.2 and that he looked after them and performed her mother's last rites was denied.

On the pleadings of the parties, the trial Court framed the following issues :-

> "1. Whether two gifts dated 22.2.1986, alleged by the plaintiff, are the outcome of fraud, coercion, mis-representation and undue influence played by defendant No.1, as alleged? OPP.

2. Whether the possession of the land in dispute of the two gifts has not been delivered to defendant No.1 by the plaintiff, as alleged? If so, its effect? OPP

3. Whether the suit is properly valued for the purposes of court fee and jurisdiction? OPP

4. If issue No.3 is not proved, what is the correct valuation of the suit? OPD.

5. Whether defendant No.2 is an adopted son of the plaintiff's mother, Gangi Devi, as alleged and the mother has gifted the land measuring 38 Kanals in favour of defendant No.2, as alleged? If so, its effect? OPP

6. Whether the suit is 'BENAMI'? If so, its effect? OPD-1.

7. Whether the suit in the present form is not maintainable? …….. OPD

7-A. Whether the suit is not maintainable as framed as no effective decree can be passed in the suit, as alleged? ……OPD

7-B Whether the plaint does not disclose cause of action? ..OPD

7-C. Whether the suit is bad for omitting the name of Vakil Singh? ..OPD

8. Relief."

During the trial, Smt. Giano Devi, plaintiff led five witnesses including herself as PW-1, and namely Jattar Singh (PW-2), Amar Singh (PW-3), Amin Chand (PW-4), Ashwani Kumar (PW-5), whereas Kesar Singh examined six witnesses, namely, S/Shri Devinder Kumar (DW-1), Kultar Pathania (DW-2), Kesar Singh (DW-3/defendant No.1) Raj Kumar (DW-4), Pritam Singh (DW-5) and Chaman Ram (DW-6). Smt. Giano Devi got exhibited will dated 5.8.1983 (Ext.P-1), receipts of the Money Order Exts. P-2 to P-22, mutation in favour of Vakil Singh Ext.P-23, mutation showing the detail of the plaintiff's ownership of land Exts. P-24 to P-27. Kesar Singh got exhibited gift deeds dated 22.2.1986 Exts.DW-2/C & DW-2/D and mutation Ext.DX dated 24.4.1986 showing him as owner.

The trial Court held that Kesar Singh was in a position to exercise and exert undue influence and dominate Smt. Giano Devi and also extort the benefit from her due to her old age, dependency and illiteracy. The relationship between them was held to be fiduciary in nature. There was enough evidence to show that she had discharged the initial burden that the transaction was a result of breach of the confidence interse between the parties. The execution of the gift deeds was not a voluntary act. Consequently, the suit was decreed vide judgment and decree dated 20.8.1994 and the gift deeds dated 22.2.1986 were held to be void and ineffective.

Aggrieved by the said judgment and decree, Kesar Singh filed an appeal which was decided by way of the impugned judgment and decree. The Appellate Court found that Smt. Giano Devi not to be an illiterate lady. She knew and understood the impact of admitting and denying the signatures on Exts.DW-2/C & DW-2/D. Version of the attesting witness that the contents of the same were read over and explained to her and that she had admitted the correctness of the same and accordingly signed before the Sub Registrar was accepted. The Court found Kesar Singh to have proved and established the execution of the gift deeds out of free will and consent, having understood the nature of the transactions. Consequently, the judgment of the trial Court was reversed and the suit was dismissed vide judgment and decree dated 1.11.1995. Kesar Singh, defendant No.1, died during the pendency of present appeal and the present respondents were impleaded in his place.

Learned counsel for the appellants-plaintiffs has assailed the impugned judgment on the ground that there is enough material on

record to show that Exts.DW-2/C and DW-2/D are bad in law for violation of the provisions of Sections 16 & 19-A of the Contract Act. The relations between Giano Devi and Kesar Singh were not cordial and for over 22 years she resided with Vakil Singh. The onus on Kesar Singh as required under Section 111 of the Evidence Act and also Section 122 of the Transfer of Property Act, has not been discharged.

Per contra, learned counsel for the respondents has argued that there is no evidence of fraud, undue influence or coercion. In the absence of evidence of undue influence, it could not be held that Kesar Singh exercised any fraud on Smt. Giano Devi. She has admitted the execution of the documents. According to him, the strained relations between the parties or her stay even for a short duration in the house of Kesar Singh would have no bearing on the gift deeds as there is no specific denial of execution of the same. To rebut the submission of the learned counsel for the appellants that the gifts are in violation of the statutory provisions, he has drawn my attention to the terms of the gift deeds, which mention the gift to be out of love and affection.

In the instant case, it is important to take note of certain undisputed facts. Plaintiff Giano Devi died issueless and was possessing substantial property at different places. That she was 70 years of age and was suffering from paralysis, is not disputed by Kesar Singh in his written statement. Kesar Singh is a collateral of the Smt. Giano Devi's father falling in the line of succession. She is alleged to have executed gift deeds Exts. DW-2/C & DW-2/D dated 22.2.1986 gifting her entire property and mutated in April,1986. The suit assailing the same was filed on 17.5.1986.

I propose to deal with the documents of the parties. Ext.P1 is the Will dated 5.8.1983 executed by Smt. Giano Devi in the names of Surjeet Singh and Harjeet Singh, children of Shri Vakil Singh, defendant No.2. They stand substituted as plaintiffs after her death. It is a document registered with the Sub Registrar, Kangra. Exts.P-2 to P-22 are the receipts of the money orders sent by Shri Vakil Singh to the Smt. Giano Devi. They pertain to the different period starting from 1972 to 1977. Ext.P-23 is the mutation showing the land belonging to Smt. Gangi Devi (mother of Smt. Giano Devi) , transferred in favour of Shri Vakil Singh. Exts. P-24 to P-27 are the jamabandies (revenue record) showing ownership and possession of Smt. Giano Devi. Exts. DW-2/C & DW-2/D are the two gift deeds (subject matter of the present suit) and as a consequence thereof Ext.D-4 is the mutation recording the name of the beneficiaries as owners.

In the recital of the gift deeds, it is simply mentioned that the same is executed out of love, affection and services rendered. No details are given. It does not refer to Ext.P-1 the registered Will executed on 5.8.1983 and the reason as to why it was superseded. It also does not mention that the gift was being made as per the desire of her late father that the property should not go out of the family hands. None of the documents have been written by the plaintiff Giano Devi and she has only appended her signature, perusal of which would show that she was an illiterate lady and just knew how to write her name and as such sign in Hindi.

The burden of proof always rests upon the person who seeks to sustain a transaction entered into with a pardanashin lady to

establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial. {***Mst. Kharbuja Kuer*** v. ***Jangbahadur Rai*** (AIR 1963 SC 1203)},

In ***Krishna Mohan Kul and another*** v. ***Pratima Maity and others*** (2004(9) SCC 468), it has been held by the apex Court that a person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. This principle has been ingrained in Section 111 of the Evidence Act, 1872. The corollary to that principle is contained in Section 16(3) of the Contract Act, 1872.

Moreover, it is always obligatory for the donee/beneficiary under a document to prove due execution of the document in accordance with law, even dehors the reasonableness or otherwise of the transaction, to avail of the benefit or claim rights under the document irrespective of the fact that whether such party is the defendant or plaintiff before the Court.

In judging the validity of transactions between persons standing in a confidential relation to each other, it is very material to see whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit and the nature of the benefit are of very great importance in such cases. Section 111 of the Evidence Act, 1872 applies equally to all persons standing in confidential relations with each other. Agents, trustees, executors, administrators, auctioneers and others have been held to fall within the rule. The logic is equally applicable to an old, illiterate, ailing person who is unable to comprehend the nature of the document or the contents thereof. It should be established that there was not mere physical act of the executant involved, but the mental act.

In ***Debi Prasad and another*** v. ***Chhotey Lal and another*** (AIR 1966 Allahabad 438), it has been held that it may be that the plaint does not use the expression 'undue influence' or the expression 'misrepresentation' but simply uses the expression 'fraud', that fact by itself would not stand in the way of the court's giving effect to the pleas actually constituted by the facts alleged in the plaint and not controverted in defence.

In ***Karunamoyee Debi*** v. ***Maya Moyi Debi*** (AIR 1948 Calcutta 84) it has been held:

> "Where undue influence is alleged, it is necessary to examine very closely all the circumstances of the case. The questions which need consideration in such a case are : (1) Was the transaction a righteous transaction, i.e. was it a thing which a right minded person might be expected to do? (2) Was it an improvident act? That is to say, does it to show so much improvidence so as to suggest the idea that the lady was not

> mistress of herself and not in a state of mind to weigh what she was doing? (3) Was it a matter requiring a legal adviser? (4) Did the intention of making the gift originate with the donor? 15. Cal 684 (P.C.)"

In ***Nathusa Pasusa Sahu*** v. ***Mohammad Siddique and others*** (AIR 1939 Nagpur 159), it has been held that it is the conscious execution and not the mechanical execution of a document that must be established in the case of documents executed by paradanashin ladies.

Smt. Giano Devi (PW-1) has deposed that her mother had brought up Shri Vakil Singh, her brother (though not by blood) and he has been looking after them and cultivating her mother's land for the last 20 to 22 years. She has acknowledged her signatures on Exts.P-1 to P-22. According to her, Shri Vakil Singh used to send her money and Shri Kesar Singh is her collateral with whom she was not in talking terms. She has denied having given any land to Kesar Singh or his children. She lived for six months in the house of Shri Kesar Singh who used to give her 'Dhooni' (smoke fire to ward off evil spirits from the person) and had taken her to Kangra for treatment. She does not remember what papers had been filled-up at Kangra. She did not understand anything happening there. Shri Kesar Singh had taken her to Tehsildar at Kangra. Shri Kesar Singh never served her. She never saw her father, as such, did not know what kind of relations Shri Kesar Singh had with him. She has neither affirmed nor denied the signatures and thumb impression on the gift deeds. Suggestions on behalf of Kesar Singh about the execution of the gift deeds and mutation of the land with her consent and knowledge are denied.

Shri Chatter Singh (PW-2) an attesting witness to the Will Ext.P-1 has deposed that the same was written on the instructions of Smt. Giano Devi.

As per the version of Shri Amar Singh (PW-3), Smt. Giano Devi did suffer a paralytic attack and as a widow required help and support which was given by Shri Vakil Singh who had been living with her for the last 20 to 22 years. He had not seen Shri Kesar Singh serving Smt. Giano Devo. Shri Vakil Singh is in possession of the suit land since the lifetime of Smt. Giano Devi. In his cross-examination, he has deposed that Giano Devi's mother had adopted Shri Vakil Singh.

Shri Amir Chand (PW-4) has stated that Smt. Giano Devi and Vakil Singh lived together in one house and he had never seen Smt. Giano Devi living with Shri Kesar Singh.

Statement of Shri Ashwani Kumar (PW-5) is also to the said effect.

Further, through the deposition of Shri Chamaru (DW-6), it is clear that Vakil Singh used to live with the Smt. Giano Devi's mother and also cultivate her land. Shri Kesar Singh (DW-3) has admitted that Smt. Giano Devi was suffering from Sciatica pain and was admitted in the hospital at Dharamshla but was being looked after both by Shri Vakil Singh and the sons of Kesar Singh. He has however, admitted that he had come home just about 10 to 15 days prior to the execution of the gift deeds and stayed for 3-4 days after the date of mutation. He could not affirm as to whether Smt. Giano Devi was literate or not.

Kesar Singh has examined Shri K. S. Pathania (DW-2) to prove that the gift was duly executed after the stamp papers were

purchased by Smt. Giano Devi. Shri Kesar Singh (DW-3) has also testified the execution of the gift deeds and mutation of the property in his name. In his cross-examination, he has admitted that in 1983, plaintiff Giano Devi had a paralytic attack and was undergoing treatment in the hospital at Dharamshala. He has denied the suggestions that he had taken Smt. Giano Devi on the pretext of getting her treated and also got the papers executed from her on the pretext that her pension would be stopped.

Shri Raj Kumar (DW-4) was the scribe to the gift deeds and Shri Pritam Singh (DW-5) has admitted that prior to the execution of the Will, Smt. Giano Devi had lived with Kesar Singh for 7 days and continued to live thereafter for approximately four months. In his cross-examination, he has admitted that he is the uncle of Kesar Singh and Smt. Gangi Devi had gifted part of her property to Smt. Giano Devi and also Vakil Singh. DW-6 has admitted that Smt. Giano Devi was taken to Kangra to get the gift deed executed.

Thus, from the deposition of the witnesses, one thing which emerges is that Shri Vakil Singh was living and taking care of both Smt. Giano Devi and her mother who had also gifted part of her property to him and the same was under his cultivation. Statement of plaintiff Giano Devi that she was having strained relations with Kesar Singh goes unrebutted. Her old age (70 years) and ailment is admitted and established. Further, there is nothing on record to show that Kesar Singh was taking care of Smt. Giano Devi except for one solitary instance when she was admitted in the hospital at Dharamshala and his sons along with Vakil Singh were attending to her. It has no where come in evidence that Smt. Giano Devi's father had desired that the property be retained within

the family. There is nothing on record to even suggest to why Smt. Giano Devi should have executed two gift deeds in favour of Kesar Singh particularly when it has been proved that the relations between Smt. Giano Devi and Kesar Singh were strained since long. There is nothing on record to suggest that Smt. Giano Devi had been living or was being taken care of by Kesar Singh. In fact the record only establishes that she lived with Kesar Singh only for that period when the gift deeds were to be executed and the property was to be mutated.

Smt. Giano Devi has stated that she was taken to Dharamshala by Kesar Singh. His presence is evident from the documents. Undisputedly, Smt. Giano Devi was old and infirm. Therefore, he was in fact in a position of active confidence and the subsisting relation between the parties is such that he was in a position to dominate the Will of Smt. Giano Devi to use it to his advantage. Plaintiff Giano Devi is an illiterate lady and upon knowing the execution of the gift deeds promptly took action to challenge the same.

In my view, plaintiff Giano Devi had discharged the initial burden of showing that the documents were not executed with the consent, knowledge and free will and, therefore, the onus rested heavily on Kesar Singh to prove the same. He was a dominant party and in a position to exercise active confidence. The probability of dominating over the Will of another party arises either directly from the nature of the relationship existing between the parties or from the peculiar disability which the other party suffered. In the instant case, Giano Devi has deposed that she remained in the house of Kesar Singh and 'Dhooni' was given to her and she had been taken to Kangra by Kesar Singh, where she

appended her signatures on some documents. This statement of her goes unrebutted as there is no cross-examination of the same. Smt. Giano Devi had not been regularly visiting Kesar Singh's house. Plaintiff Giano Devi is not on visiting terms with Kesar Singh nor is there any evidence to show that any service was rendered by Kesar Singh. Therefore, the contents of the gift deeds that the same are being executed out of love and affection and service rendered, are contrary to record and thus incorrect. There was no occasion for Smt. Giano Devi to have executed any gift deeds, therefore, it cannot be said that the gift deeds were executed out of love and affection or service.

The trial Court has dealt with the deposition of the defendants' witnesses and the same is reproduced hereunder:-

> "Apart from it, the evidence of DW-5 Prithi Singh, marginal witness shows that Smt. Giano Devi appeared before the Tehsildar (Sub Registrar) and the Sub Registrar read over the contents of the gift deeds, to which she admitted to be correct. But the statements of DW-2 Shri K. S. Pathania, Advocate and DW-3 Kesar Singh defendant, do not show that the contents of the gift deeds were read over and explained to her and she understood the contents of the gift deeds. DW-2 Shri K. S. Pathania, Advocate has deposed that she herself disclosed to the Tehsildar that she had gifted the suit land to the defendant, the fact which is not corroborated by any other witness. There is also nothing on record that she had any independent legal advise before executing the deeds in dispute in favour of the defendant. Had these been executed of her free will, she had atleast taken Shri Vakil Singh with her at the time of execution of the gift deeds or taken his advise, who was looking after and maintaining her. The statement of DW-2 Shri K. S. Pathania, Advocate, also shows that Smt. Giano Devi herself approached him that she intends to

> execute gift deed in favour of the defendant. But his statement stands belied from the statement of DW-5 Prithi Singh. DW-5 Prithi Singh has deposed that she had gone directly to the deed writer. Defendant has also not corroborated this part of DW-2 evidence. Defendant has also examined DW-6 Chamaru and his statement shows that Smt. Giano Devi was pressing to gift her property in favour of the defendant. But his statement does not inspire confidence as no such suggestion was given to her nor the defendant deposed it in his statement. He appears to be a planted witness after thought."

The first Appellate Court has bypassed the same. I have gone through the statements of the witnesses and am in agreement with the said findings of the trial Court.

The Ist Appellate Court has held that plaintiff Giano Devi does not seem to be an illiterate lady as she had appended her signature on the documents. I have seen the documents Exts.P-1 to P-22 and Exts. DW-2/C to DW-2/D. Her handwriting is broken and she has just been able to write her name which actually are her signatures and from the same it is clear that she is an illiterate lady. In fact Kesar Singh's own witnesses could not confirm as to whether Smt. Giano Devi was an illiterate lady. Therefore, finding of the first Appellate Court while setting aside the well reasoned judgment of the trial Court is perverse, contrary to record and law.

From the material on record, it cannot be said that plaintiff Giano Devi had executed two gift deeds voluntarily without undue influence or independent advice. No doubt, the scribe, the witness and the Advocate who purchased the stamp duty had deposed that Smt. Giano

Devi had signed the gift deeds, however, Kesar Singh has failed to discharge the burden that Smt. Giano Devi was under no pressure and had voluntarily executed the document after knowing and fully understanding the consequences of her actions.

The gift deeds are outcome of fraud, coercion, mis-representation and undue influence. There existed a fiduciary relationship between the contracting parties and the burden of proof shifted upon Kesar Singh for proving the due execution of gift deeds in question. The Ist Appellate Court has wrongly appreciated the evidence on record. However, the gift deeds cannot be assailed on the ground that the possession had not been delivered.

The questions of law are answered accordingly.

For all the aforesaid reasons, the judgment and decree dated 1.11.1995 passed by the District Judge, Kangra at Dharamshala, in Civil Appeal No. 89-D/XIII-1995 titled as Kesar Singh v. Surjeet Singh & another, is set aside and that of the trial Court passed in Civil Suit No. 280 of 1986 dated 20.8.1994 titled as Surjeet Singh and another vs. Kesar Singh, is restored.

The appeal is allowed accordingly.

(Sanjay Karol),
Judge.

October 29 , 2007.
(*rana*)